

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 524 of 1991

For Approval and Signature:

Hon'ble MR.JUSTICE S.M.SONI and
MR.JUSTICE J.R.VORA

- =====
1. Whether Reporters of Local Papers may be allowed to see the judgements?
 2. To be referred to the Reporter or not?
 3. Whether Their Lordships wish to see the fair copy of the judgement?
 4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
 5. Whether it is to be circulated to the Civil Judge?

MANILAL KAMRAJ

Versus

STATE OF GUJARAT

Appearance:

MR SG UPPAL (appointed) for Petitioner
MR SR DIVEDIA, APP for Respondent No. 1

CORAM : MR.JUSTICE S.M.SONI and
MR.JUSTICE J.R.VORA

Date of decision: 25/03/98

ORAL JUDGEMENT (Per S.M.Soni, J.)

Appellant-original accused in Sessions Case No.140/90 is held guilty for offence punishable under section 302 of IPC and 135(1) of the Bombay Police Act and is sentenced to undergo rigorous imprisonment for life and rigorous imprisonment for four months

respectively by the judgment and order dated 17th May, 1991 by the Addl. Sessions Judge, Mehsana. This judgment and order is challenged in this appeal.

Facts leading prosecution of the appellant ('accused' for short) are as under:

Accused, an ordinary resident of village Piludra was residing with his younger son Babubhai at Surat. Two days before the date of incident, he had come to stay with his family members at Piludra. His family at Piludra consist of his other 4 sons, a daughter, his wife, daughter-in-law and a grand child. At about 9.00 a.m. on 25th March, 1990, possibly a Sunday, all the members of his family were viewing 'Mahabharata' serial on TV. After the serial was over, accused told his wife that Babubhai is not taking proper care of him at Surat and therefore she should accompany him to Surat. He insisted her to join him so that his son may take his care properly. The wife of the accused told him that being a season to reap wheat, she will not be able to come. His son Narendra also told him that as there is reaping of wheat, she cannot come. However, if he wants he may take leave for two days and accompany him and he will make necessary arrangements to see that Babubhai takes his care properly and that he will also reprimand Babubhai. The accused, therefore, at once got enraged and told his wife "why can't you come with me at Surat" and in anger, he left the house. By about 12 to 12.30 noon, he returned home and was telling his family members that "you people do what you decide in your mind and you people are not telling me anything". He was highly enraged and gave a knife blow on the left side of the neck of his wife. His wife shouted and his sons Narendra, Dilip and daughter Gita then caught hold of the accused and drew him away. She was taken to Civil Hospital, Mehsana where she was declared dead. His son Narendra PW 3 has seen him inflicting knife blow on his mother (wife of the accused).

Narendra, son of the accused, gave complaint to the police, on the basis of which offence was registered at Mehsana Taluka Police Station. Investigation was commenced and on completion of the investigation, accused was chargesheeted in the Court of Judicial Magistrate, First Class, Mehsana, who in his turn committed the case against the accused to the Court of Sessions at Mehsana.

The learned Addl. Sessions Judge, Mehsana framed charge against the accused under section 302 of the Indian Penal Code as well as under section 135 of the

Bombay Police Act. Accused pleaded not guilty and claimed to be tried. Prosecution led necessary evidence to prove the charge levelled against the accused. On completion of the prosecution evidence, further statement of the accused was recorded. From the nature of cross-examination and further statement, defence of the accused appears to be of unsoundness of mind of accused at the time of commission of act which is now alleged as an offence. The accused also led defence evidence to prove that he was of unsound mind at the relevant time. The learned Addl. Sessions Judge could not find favour with the defence and held the charge levelled against the accused proved and passed the order of conviction and sentence referred above.

Learned advocate Mr Uppal for the accused has assailed the judgment of the learned Addl. Sessions Judge on the ground (1) that the prosecution has failed to prove beyond reasonable doubt the guilt of the accused, (2) that even if the guilt is proved, then at the time of commission of act which amounts to guilt, he was of unsound mind. His case, therefore, would fall within section 84 of the Indian Penal Code and his act does not amount to an offence. Mr Uppal, therefore, contended that the learned Addl. Sessions Judge has erred in convicting the accused. Mr Uppal further contended that conviction under section 135(1) of the Bombay Police Act is illegal inasmuch as the same is not warranted by either the facts of the case or the notification on which the prosecution has relied.

Mr S.R.Divetia, learned APP, supports the judgment of the learned Addl. Sessions Judge. Mr Divetia contended that the evidence of PW 3 and PW 4, son and daughter of the accused, together with other circumstances on record are sufficient to prove the guilt of the accused and the learned Addl. Sessions Judge has not erred in accepting the same. Mr Divetia contended that if the accused claims defence of exception under section 84 of Penal Code, the burden to prove that defence is on the accused in view of the provisions of section 105 of the Evidence Act. Mr Divetia contended that though the same is not required to be proved like a prosecution case beyond reasonable doubt, yet the accused has failed to prove the defence. Mr Divetia, therefore, contended that interference in the conclusion arrived at by the learned Sessions Judge would not be warranted in view of the evidence on record.

In order to appreciate the diverse contentions of the learned advocates, it will be relevant to refer to

the evidence of PW 3, eldest son of the accused. PW 3 has stated to the effect that after 'Mahabharata' serial was over, his father told his mother that Babu is not keeping him well and that she should accompany him to Babu. At that time, his mother told him that as that being a season for reaping of wheat, she is not able to come. Thereafter the witness also told his father that this being a season for wheat his mother will not be able to come. However, he was prepared to go with him on taking leave for two days. His father therefore got enraged and there was exchange of words and his father went out of the house. By about 12 O' clock, his mother was swinging his child in a cradle. He, his wife, his brother Dilip and his sister Gita were in the house at that time. His father came there and told his mother that "you must come with me to Surat. Keep all your work aside. You are not accepting my word nor you are staying besides me". So saying, he took out knife and inflicted blow on the left side of neck of his mother. His mother on being injured just raised voice. The witness then ran towards his mother and pushed off his father away. At that time, Dilip and Gita, brother and sister of PW 3 were also present. This part of the evidence is supported by the evidence of Gitaben, PW 4. In the cross examination of this witness, he has admitted that his father was suffering from mental disease since last 25 years and that the disease is aggravated since last 8 years and that he was not following say of anyone in the house because of his mental condition. As he was not listening to anyone in the village, he was sent to Surat since two years and Babu was taking his care. His father had inflicted knife blow on his grand father because of mental sickness. He has admitted in the cross-examination that since his arrival from Surat, his father was behaving properly with the members of the family. He was having dialogue with all and was staying cheerfully. An attempt was made to show from where knife came and as to whether the knife was in the pocket or in the hand. He has admitted that he does not know as to what happened to the knife. In view of this cross-examination, we do not find any reason not to accept the say of this witness PW 3 which is corroborated by the evidence of his sister PW 4.

Dr.Manilal, PW 1, who has performed post-mortem has stated that the deceased had oblique incise wound on left side of neck anteriorly stappering below. Depth pointing downwards and medially with left common carotid artery and left jugular vein cut 2 cm. x 1/5 cm. x muscle deep. According to doctor, PW 1, this injury was sufficient in the ordinary course of nature to cause

death. According to doctor, this injury can be caused by muddamal knife shown to him. The evidence of doctor and the injury in our opinion corroborates the say of PW 3 Narendra to the effect that knife blow was inflicted by his father on his mother who was sitting and swinging cradle.

The accused was arrested in the evening at about 4 O'clock. His clothes were found stained with blood. Knife was seized from his pocket. However, the knife had human blood stains, but group could not be detected. Thus from the evidence of PW 3, PW 4 and PW 1, the prosecution has proved that it is the accused who has inflicted knife blow on the left side neck of the deceased as a result of which she died.

The accused has come out with a defence that at the time of commission of offence by reason of unsoundness of mind, he was not knowing or was not capable of knowing the nature of act or that what he was doing is either wrong or contrary to law. Section 105 of the Evidence Act provides that it is the accused who has to prove that his case falls within any of the exceptions. Section 84 of the Penal Code refers to an act of a person of unsoundness falls within the general exception and when the accused claims exception, it is he who has to prove the same. It is now settled legal position that the accused is not required to prove his defence beyond reasonable doubt, but he has to prove with a reasonable probability. The question, therefore, is as to whether in the instant case the accused has been able to bring his case within the purview of section 84 of the Penal Code. For the same, it will be relevant to refer to the evidence led by the accused as well as the evidence of prosecution relied on by the accused. In the cross-examination of PW 3, he has admitted that he had filed a complaint against his father for the murder of his grand-father. In that complaint he has stated that his father was suffering from mental disease since 25 years. Since last 8 years, the said disease has aggravated. Because of the mental imbalance, he did not follow the say of anyone in the house and was committing mischiefs. He was, therefore, sent to Surat to stay with Babu. He was sent to Surat since two years. Babu used to take his care. The complaint was filed to the effect that because of mental sickness, he has inflicted knife blow on his grand-father. Relying on this say in the cross-examination, Mr Uppal contended that the accused was of unsound mind at the relevant time. To substantiate this say, accused has examined defence witness Dr.Girishbhai Trivedi, Ex.37. We may make it

clear that Dr.Girishbhai is not a qualified doctor. He is only a social worker and whatever he has referred about the mental condition of the accused is for the period from 16th November, 1986 to 25th November, 1988. Therefore assuming that mental condition of accused was not good as stated by Dr.Girishbhai, it was not good during the period of November 1986 to November, 1988. This cannot lead us to infer that his mental condition was not good even in March, 1990. Dr.Girishbhai has produced a letter written by a Mental Hospital at Shahibaug Road, Ahmedabad. But that reflects the mental condition of the accused for the period from November 1986 to November 1988. This does not lead again to infer as to the mental condition of the accused for the period of March, 1990 when the present act was committed. We have, therefore, to fall back upon the prosecution evidence, if it can show anything about the mental condition in the month of March, 1990. Narendra, PW 3, in his evidence has specifically stated in the cross-examination that since his arrival from Surat till the date of incident, his father was staying with the members of the family very happily. He used to have dialogue with all and was living cheerfully. He has further admitted that his father was not taken to mental hospital till the date of incident. The dialogue which took place and not disputed by the defence in our opinion suggests that the accused was not of unsound mind at the relevant time. Accused expected his wife to be with him at Surat as according to him his son Babubhai is not keeping him well. PW 3 has suggested a solution that it being a season of wheat, she may not go, but he was ready to accompany him and reprimand Babubhai to keep him well. This dialogue took place after the Mahabharata serial was over. During the course of viewing Mahabharata serial no abnormal behaviour is either detected or shown by the accused. Accused after having arrested filed a complaint that his sons Narendra, Dilip and daughter Gita have assaulted him by fists and kicks. We do not propose to read the contents as regards the commission of offence which are in the second part of the complaint as in our opinion that is not admissible in evidence. But first part of the complaint which simply narrates as to how he came to Piludra from Surat, in our opinion, can be read as the same story is narrated by PW 3 and 4 in their evidence and that is to the effect that he came to Piludra from Surat because of a verbal exchange with his son Babubhai. Thus in our opinion, we are not able to infer from the evidence led by the prosecution that the accused was incapable of knowing the nature of the act or that he is doing what is either wrong or contrary to law by reason of unsoundness of mind. Thus from the defence

evidence as well as from the evidence of the prosecution, the same is not proved by the accused. As the accused has failed to prove the specific defence of the act falling within the general exception and in particular under section 84 of the Penal Code and when the prosecution is able to prove that it is the accused who has committed the act of causing injury on the left side neck of the deceased, we do not find any reason to interfere with the conclusion arrived at by the learned Addl. Sessions Judge as regards the conviction under section 302 of the Penal Code.

The learned Addl. Sessions Judge has held the accused guilty of offence under section 135(1) of the Bombay Police Act. The learned Addl. Sessions Judge has relied on Ex.16 for the proof of that offence. Ex.16 is a notification issued by the Addl. District Magistrate, Mehsana on 13th March, 1990, prohibiting movement with certain weapons. Clause (1) of the notification reads as under (free and true translation):

"Either to gather or to move in public with the following weapons, namely, weapons, sword, sphere, stick, rifle, knife or any instrument or weapons which may cause physical injury."

Prohibition under this notification is on the movement of the person with weapons in public. In the instant case, offence is committed in the house. Knife which is used for committing offence in the instant case appears to be like a pen knife. The accused has not moved with the weapon. Movement referred to in Ex.16 is the movement in public and not in the house. Otherwise, every house-wife would be held guilty under section 135(1) of the Bombay Police Act as house-wives may be in possession of knife, many a times, bigger in size than the one like penknife. Therefore, in our opinion, section 135(1) of the Bombay Police Act is not attracted in the instant case and the conviction recorded by the learned Addl. Sessions Judge under the provisions of Bombay Police Act is bad and is liable to be quashed.

In the result, the appeal is partly allowed. Appeal against the judgment and order of conviction and sentence under section 302 of IPC is dismissed. Judgment and order of conviction and sentence under section 135 of the Bombay Police Act is set aside. Order accordingly.

.....

(vjn)

